Nos. 02-241, 02-516

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IN THE

Supreme Court of the United States

BARBARA GRUTTER,

Petitioner,

v.

LEE BOLLINGER, *et al.*,

Respondents.

JENNIFER GRATZ and PATRICK HAMACHER,

Petitioners,

v.

LEE BOLLINGER, *et al.*,

Respondents.

ON WRITS OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF OF NEW YORK CITY COUNCIL SPEAKER A. GIFFORD MILLER, NEW YORK CITY COUNCIL MEMBERS BILL DE BLASIO, HELEN FOSTER, HIRAM MONSERRATE, CHARLES BARRON, WILLIAM PERKINS, JOEL RIVERA, LEROY G. COMRIE AND OTHER INDIVIDUAL MEMBERS OF THE NEW YORK CITY COUNCIL AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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INTEREST OF AMICI CURIAE[1]

Individual members of the New York City Council (the "Council Members")[2] are the elected representatives of the people of New York City. The New York City Council, the legislative branch of the city government, is made up of fifty-one Council Members elected from districts spread throughout the five boroughs of the City of New York.

Every year, nearly forty thousand New York City residents graduate from public high schools. *See* New York City, Dep't of Educ., *Statistical Summaries, available at* http://www.nycenet.edu/stats/ (last visited Feb. 13, 2003). The vast majority of those students plan to enroll in colleges and universities in New York City and throughout the country. *See* New York City, Dep't of Educ., *2000-2001 Annual School Reports* (2002), *available at* http://www.nycenet.edu/daa/

1. Pursuant to Supreme Court Rule 37.3(a), all parties have filed with the Court their written consent to the filing of all *amicus curiae* briefs. Pursuant to Supreme Court Rule 37.6, counsel for *amici curiae* certifies that counsel for *amici curiae* authored this brief in its entirety. No person or entity other than the *amici curiae* or their counsel has made a monetary contribution to the preparation or submission of this brief.

2. This brief is submitted on behalf of the following individual members of the New York City Council: New York City Council Speaker A. Gifford Miller and New York City Council Members Bill de Blasio, Helen Foster, Hiram Monserrate, Charles Barron, William Perkins, Joel Rivera, Leroy G. Comrie, Tony Avella, Maria Baez, Gale A. Brewer, Yvette D. Clarke, Alan J. Gerson, Sara Gonzalez, Robert Jackson, Melinda R. Katz, G. Oliver Koppell, John C. Liu, Margarita Lopez, Michael E. McMahon, Christine Quinn, Domenic M. Recchia, Philip Reed, Diana Reyna, James Sanders, Jr., Larry B. Seabrook, Jose Serrano, Kendall Stewart, Albert Vann and David Yassky.

01asr/ (last visited Feb. 13, 2003). Countless other New York City residents attend graduate and professional schools each year. Given the diversity of New York City, many of these students are members of ethnic and racial groups that are generally under represented at selective universities and colleges throughout the country (hereinafter, "under-represented minorities"). As representatives of these under-represented minorities, the Council Members are committed to removing the barriers to higher education that these students face. The Council Members also seek to ensure that all New York City students are able to pursue higher education at schools with diverse student bodies, where they share experiences inside and outside of the classroom with classmates who possess varying backgrounds and perspectives.

New York City is also the center of business in the nation, and indeed, the world. Each year, thousands of college and professional school graduates come to New York City to work for its many corporations as well as for the City itself. Like the residents of the city in which they are based, New York businesses operate in an increasingly global and diverse environment. Their continued success depends in part on their ability to interact with increasingly diverse customers, competitors, employees, and vendors. In order to do this, they must be able to recruit from an applicant pool that includes well-educated individuals from a broad range of racial and ethnic backgrounds.

SUMMARY OF ARGUMENT

Through race-conscious admissions plans at both its Law School and its undergraduate school of Literature, Science & the Arts, the University of Michigan (the "University") seeks to further an interest that the Court has already found compelling: diversity. Indeed, in *Regents of the Univ. of Cal. v. Bakke*, the Court found diversity a compelling interest in the context of a university's admissions program. *See* 438 U.S. 265, 313-15 (1978) (Powell, J.). Overruling *Bakke* would ignore the doctrine of *stare decisis* and deny students and their future employers the wealth of benefits that flow from a richly-diverse student body.

But affirmative action serves to advance more than a single compelling state interest. In addition to promoting educational diversity, affirmative action improves the social conditions facing many under-represented minorities today. As such, it advances an alternative and equally compelling government interest in narrowing the glaring gap between the social conditions of under-represented minorities and those of Caucasians in this country.

The University's Law School and current undergraduate admissions policies (collectively, the "University Policies") are narrowly tailored to achieve both of these compelling interests. Indeed, both policies follow to the letter the guidelines for a constitutionally-permissible affirmative action admissions plan set out by the Court in *Bakke*. Contrary to the brief submitted by the United States, "top percentage" plans do not present a viable race-neutral alternative to affirmative action plans. Such policies suffer fatal limitations, including: (i) their failure to enroll under-represented minorities at selective state schools; (ii) a dependence upon—

and perpetuation of—segregated secondary schools; and (iii) their complete inapplicability at the graduate and professional school level.

Accordingly, whether this Court relies upon the diversity rationale in *Bakke* or the social conditions rationale discussed herein, it should affirm the rulings of both the Sixth Circuit in *Grutter* and the Eastern District of Michigan in *Gratz* and uphold the University Policies as narrowly-tailored to achieve a compelling state interest.

ARGUMENT

I. DIVERSITY IS A COMPELLING STATE INTEREST JUSTIFYING RACE-CONSCIOUS UNIVERSITY ADMISSIONS POLICIES

In upholding the constitutionality of the University Policies, the lower courts took clear direction from the Court. Following Justice Powell's binding opinion in *Bakke*, both courts determined that the University's interest in educational diversity was sufficiently compelling to survive strict scrutiny. *See Grutter v. Bollinger*, 288 F.3d 732, 739 (6th Cir.) (en banc), *cert. granted*, 123 S. Ct. 617 (2002); *Gratz v. Bollinger*, 122 F. Supp. 2d 811, 820 (E.D. Mich. 2000).

This Court should follow the same path to reach an identical conclusion. While the *Bakke* Court was fragmented, the opinion of the Court unquestionably recognized diversity as a compelling state interest. In the more than twenty years since *Bakke* was decided, the Court has never questioned—let alone overruled—this fundamental holding. It should not do so here.

A. Diversity in Education is a Compelling State Interest Under *Bakke*

In *Bakke*, the Court confronted the constitutionality of a race-conscious admissions plan at the University of California at Davis Medical School ("Davis"). Unlike the University Policies at issue here, the Davis policy utilized a two-track admissions system that set aside a predetermined number of spaces in each class for minority applicants. *See Bakke*, 438 U.S. at 272-73. Delivering the judgment of a fragmented Court, Justice Powell applied strict scrutiny to the Davis plan. He accepted Davis' argument that its policy was aimed at achieving a compelling state interest: diversity in its student body. Recognizing the value of attaining a "robust exchange of ideas" in the university setting, Justice Powell concluded that "the interest of diversity is compelling in the context of a university's admissions program." *Id.* at 314. Ultimately, however, Justice Powell rejected the university's policy as not narrowly tailored to achieve this permissible goal. *See id.* at 315-16.

Much debate has centered around whether Justice Powell's opinion constituted the opinion of the Court in *Bakke*. Four Justices concurred in his opinion, although all four would have approved a more expansive consideration of race in admissions and upheld the Davis policy as constitutional. *See id.* at 324-408 (Blackmun, Brennan, Marshall, & White, JJ., concurring). Four Justices dissented from Justice Powell's opinion, although none of the four even addressed the constitutionality of the Davis policy, focusing instead on Title VI of the Civil Rights Act. *See id.* at 412-21 (Stevens, Rehnquist, Stewart, JJ. & Burger, C.J., concurring in part and dissenting in part). None of the other Justices explicitly endorsed Justice Powell's diversity rationale.

There is, however, an "answer" to this much debated question—one that the Sixth Circuit found in *Grutter*. The Court has provided explicit guidelines for extracting a rule from the various opinions of a divided Court. In *Marks v. United States*, the Court held that "[w]hen a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, 'the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds.'" *Marks*, 430 U.S. 188, 193 (1977) (internal citation omitted). Applying this rule to *Bakke*, the Sixth Circuit in *Grutter* properly determined that Justice Powell's strict scrutiny analysis of Davis' admissions policy permitted the "most limited consideration of race" and, accordingly, constituted the narrowest ground on which the majority agreed. *See Grutter*, 288 F.3d at 741. In short, under *Marks*, Justice Powell's opinion—including his clear proclamation that educational diversity is a compelling state interest—constitutes the holding of *Bakke*.

B. *Bakke* Has Not Been Overruled and Remains Good Law

This Court retains the sole power to overrule its own decisions. *See Agostini v. Felton*, 521 U.S. 203, 237 (1997) (quoting *Rodriguez de Quijas v. Shearson/Am. Exp., Inc.*, 490 U.S. 477, 484 (1989)). It has never done so with *Bakke*. To the contrary, years after *Bakke* was decided, the Court explicitly recognized Justice Powell's diversity rationale. *See Metro Broadcasting, Inc. v. FCC*, 497 U.S. 547, 568 (1990) ("Just as a 'diverse student body' contributing to a 'robust exchange of ideas' is a 'constitutionally permissible goal' on which a race-conscious university admissions program may be predicated, the diversity of views and

information on the airwaves serves important First Amendment values.") (Brennan, J.) (citing *Bakke*, 438 U.S. at 311-313), *overruled on other grounds*, *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200 (1995).

Moreover, on the several occasions since *Bakke* that the Court has considered affirmative action policies in contexts other than higher education, *see, e.g.*, *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200 (1995); *City of Richmond v. J. A. Croson, Co.*, 488 U.S. 469 (1989); *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267 (1986), it has left untouched the pivotal holding in *Bakke*: that diversity can be a compelling state interest justifying affirmative action. Thus, in the absence of any decision from the Court overruling *Bakke*, the case—including Justice Powell's opinion of the Court upholding diversity as a compelling state interest—remains binding precedent.

C. This Court Should Not Overrule *Bakke*

Nor should this Court overrule *Bakke* today. To do so would not only disregard the doctrine of *stare decisis*, but would also deprive millions of students of all races, as well as their potential employers, of the benefits of a diverse learning environment.

1. *Stare decisis* requires that *Bakke* be left undisturbed

Regardless of this Court's views of Justice Powell's analysis and opinion in *Bakke*, "the principles of *stare decisis* weigh heavily against overruling it now." *Dickerson v. United States*, 530 U.S. 428, 443 (2000). The Court has consistently recognized that while the rule of *stare decisis* is not an

"inexorable command," a departure from precedent must be supported by some "special justification," *id.*, or "compelling reason." *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, 867 (1992). No such reason exists for overruling *Bakke*.

In deciding whether a "special" or "compelling" reason for overruling precedent exists, the Court has looked to several factors, including: (i) whether the rule has become unworkable, *see Casey*, 505 U.S. at 855 (citing *Swift & Co. v. Wickham*, 382 U.S. 111, 116 (1965)); (ii) whether related principles of law have developed so as to "have left the old rule no more than a remnant of abandoned doctrine," *id.* (citing *Patterson v. McLean Credit Union*, 491 U.S. 164, 173-74 (1989)); (iii) whether facts have changed so as to have robbed the old rule of its significance, *see id.* (citing *Burnet v. Coronado Oil & Gas Co.*, 285 U.S. 393, 412 (1932) (Brandeis, J., dissenting)); and (iv) whether the rule has been relied upon and become embedded in our legal culture, *see id.*; *Dickerson*, 530 U.S. at 443.

Here, none of these factors favors overturning *Bakke*. In brief, *Bakke* is as workable today as it was when it was decided. No change in factual circumstances has robbed Justice Powell's opinion of significance. To the contrary, students of color remain grossly under represented in selective universities today. Finally, and perhaps most significantly, in the years since *Bakke* was decided, affirmative action has gained cultural centrality. *See Dickerson*, 530 U.S. at 443 (refusing to overturn *Miranda v. Arizona* where it had "become embedded in routine police practice to the point where the warnings have become part of our national culture"). Indeed, affirmative action has become virtually standard for admissions policies throughout the country.

Without any compelling reason to overrule *Bakke*, this Court should leave the decision undisturbed under the principles of *stare decisis*.

2. Overruling *Bakke* would deny students and their future employers the benefits of a diverse student body

Overruling *Bakke* would do far more than disrupt the Court's precedent. Perhaps even more importantly, it would deprive future generations of students of the benefits that flow from a racially diverse student body. In the more than twenty years since *Bakke* was decided, students—including the tens of thousands graduating from New York City schools each year—have been able to exchange viewpoints with classmates of varied racial and ethnic backgrounds. Absent affirmative action, many of these students would lose this opportunity.

The effects of overturning *Bakke* would soon also reach businesses and employers across the nation, including in New York City, where so many businesses are located. In order to thrive, today's increasingly global companies need to recruit under–represented minority students who are graduates of the country's best schools as well as other graduates who have grown accustomed to sharing ideas in an environment rich with diversity.

Finally, as discussed below, race-conscious admissions policies are a proven way of helping under-represented minorities improve their socio-economic status in society. *See infra* at II.B. Overruling *Bakke* would cripple a significant means of social advancement for many people of color.

II. NARROWING THE GAP BETWEEN SOCIAL CONDITIONS OF UNDER-REPRESENTED MINORITIES AND CAUCASIANS CONSTITUTES AN ALTERNATIVE COMPELLING GOVERNMENT INTEREST

Like the lower courts, this Court can uphold the University Policies by relying on *Bakke* alone. However, should it determine that Justice Powell's opinion is not the holding in *Bakke*, or decide to overrule *Bakke* altogether, there is an alternative compelling interest that justifies the University's race-conscious admissions policies: an interest in narrowing the existing gap between the social conditions of under-represented minorities and those of Caucasians in this country.[3]

Students applying to any university program today live in a country with a startling gap between the economic and social conditions of under-represented minorities and those of Caucasians. Whatever the causes of these social and economic conditions may be, it is clear that the effects of these conditions depress the advancement not only of under-represented minorities, but of society as a whole. Confronting the existing disparity and helping to close the gap in social conditions is a compelling state interest that justifies upholding the University's affirmative action policies.

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3. The alternative theory presented in this section is set out in full in a recent article published in the Boston College Law Review. *See* Jack Greenberg, *Affirmative Action in Higher Education: Confronting the Condition and the Theory*, 43 B.C. L. Rev. 521 (2002).

A. Socio-Economic Conditions Facing Under-Represented Minorities Nationwide

No one statistic captures the socio-economic conditions of all under-represented minorities in this country. Taken together, however, several economic and social indicators reveal an undeniable disparity between the social conditions of under-represented minorities and those of Caucasians. While it is impossible to discuss them all, these indicators demonstrate most vividly the disadvantaged conditions under which many under-represented minorities live.

1. Economic Conditions

On average, under-represented minorities occupy the lower rungs of this country's economic ladder. For the last two years, African Americans have been more than twice as likely to be unemployed as Caucasians. *See* Bureau of Labor Statistics, U.S. Dep't of Labor, *Employment Status of the Civilian Noninstitutional Population by Sex, Age, Race & Hispanic Origin*, *available at* http://www.bls.gov/lau/table12full01.pdf (last visited Feb. 14, 2003). During the same time period, the national unemployment rate for Latinos was approximately 55% higher than the rate for Caucasians. *See id.*

Moreover, those under-represented minorities who are employed are likely to earn far less than their Caucasian counterparts. In 1999, while the median family income was $53,356 for Caucasians, it was only $33,255 for African Americans and $34,397 for Latinos. *See* U.S. Census Bureau, U.S. Dep't of Commerce, *American FactFinder* (2002), *available at* http://factfinder.census.gov (last visited Feb. 13, 2003); *see also Vital Signs: Statistics that Measure the State*

of Racial Inequality, 38 J. Blacks Higher Educ. (Winter 2002/2003) ("In 2001 the median black family income in the United States as a percentage of the median white family income: 62%"), *available at* http://www.jbhe.com/vital/index.html (last visited Feb. 13, 2003). In 2001, when 7.8% of Caucasian Americans were living in poverty, nearly three times as many African Americans (22.7%) were living under such conditions. *See Vital Signs*: *Statistics that Measure the State of Racial Inequality*, 37 J. Blacks Higher Educ. 79 (Autumn 2002).

Perhaps unsurprisingly, on average, under-represented minorities have also amassed far less personal wealth than Caucasians. In 1995, the median value of household assets was $49,030 for Caucasian households, but only a fraction of that amount—just over $7,000—for African American and Latino households alike. *See* U.S. Census Bureau, U.S. Dep't of Commerce, *Asset Ownership of Households*: *1995*, *available at* www.census.gov/hhes/www/wealth/1995/wlth95-1.html (last visited Feb. 13, 2003). Statistics from New York City reveal an even more significant disparity. In the late 1990s, the median value of assets in a Caucasian household was valued at $14,013, while the median value of assets in an African American household was $623. *See* Lenna Nepomnyaschy & Irwin Garfinkel, *Wealth in New York City and the Nation*: *Evidence from New York Social Indicators Survey and the Survey of Income and Program Participation* 11 (Columbia University School of Social Work, Social Indicators Survey Center, Working Paper No. 02-02), *available at* http://www.siscenter.org/Wealth%209-4-02.pdf (last visited Feb. 13, 2003).

2. Social Conditions

Statistics from the educational arena demonstrate similar inequities. In 2000, 17.8% of all African American adults over the age of twenty-five had completed four or more years of college, as compared with 34% of Caucasians of the same age. *See Vital Signs*: *Statistics that Measure the State of Racial Inequality*, 36 J. Blacks Higher Educ. 83 (Summer 2002). The same year, while 77.3% of all Caucasian American children ages three to seventeen had access to a computer at home, only 42.5% of African American children had such access. *See Vital Signs*: *Statistics that Measure the State of Racial Inequality*, 34 J. Blacks Higher Educ. 79 (Winter 2001/2002).

In New York City, a recent report on educational performance showed a wide gap in the performance of under-represented minority children and Caucasian children on statewide achievement tests. While 70% of Caucasian fourth graders met New York State standards in English, only 37% of African American children and 35% of Latino students met these standards. *See* Anemona Hartocollis, *Racial Gap in Test Scores Found Across New York*, N.Y. Times, Mar. 28, 2002, at A1. This gap diminished, but clearly persisted, through eighth grade achievement tests. *See id.* (showing 57% Caucasian , 24% African American, and 25% Latino students met standards in English; 45% Caucasian, 12% African American, and 14% Latino students satisfying state math standards).

Under-represented minorities are also over-represented in the nation's criminal justice system and prison population. In 2000, 205.8 of 100,000 African American men between the ages of eighteen and twenty-four had been convicted of

homicide, as compared to 23.9 out of 100,000 Caucasian males of the same age. Bureau of Justice Statistics, U.S. Dep't of Justice, *Homicide Trends in the United States*, *available at* http://www.ojp.usdoj.gov/bjs/homicide/tables/oarstab.htm (last visited Feb. 13, 2003). In New York City, African American and Latino women constitute fifty-five percent of the female population, but eighty-five percent of all women arrested in 2001. *See* New York City Council Committee on Women's Issues, *Oversight*: *The Second Annual Report on the Status of Women of Color in New York City* 4 (2003).

This disparity carries over to the victims of violent crime as well. In 2000, 100.2 of 100,000 African American eighteen to twenty-four year olds were homicide victims as compared to 12.1 of 100,000 Caucasians. *See* Bureau of Justice Statistics, U.S. Dep't of Justice, *Homicide Trends in the United States*, *available at* http://www.ojp.usdoj.gov/bjs/homicide/tables/varstab.htm (last visited Feb. 13, 2003).

Taken together, these conditions create an environment that not only hampers the advancement of under-represented minorities, but harms all of society. The economic situation of under-represented minorities depresses the national economy as a whole. Similarly, high crime rates affect all individuals within a community as well as taxpayers. When viewed together, the gap in social conditions is unquestionably a compelling problem that our public institutions must be permitted to correct.

B. Race-Conscious University Admissions Policies are a Proven Means of Redressing the Social Conditions of Under-Represented Minorities

Given the pervasiveness of the "social gap," there is no one solution that could remedy all of the conditions faced by many communities of color. University affirmative action policies, while not a panacea, are a proven way of improving the social conditions of many minorities.

According to the Journal of Blacks in Higher Education,

> [O]ver the past 30 years, at least 15,000 black students admitted under affirmative action guidelines have graduated from America's 25 highest-ranked universities. Another 15,000 African Americans, also admitted under preferential admissions policies, have graduated from the nation's highest-ranked law schools. Some 10,000 more blacks have successfully entered the business world after admissions under affirmative action policies that were established at our leading business schools. Another 3,500 young blacks have graduated from our most distinguished medical schools.

T.L.C., *Thomas Carlyle and Affirmative Action*, 24 J. Blacks Higher Educ. 7 (Summer 1999).

Graduates of these selective universities have entered and excelled in the professional world. Since the 1960s when affirmative action plans were first utilized, the percentage of African American physicians in this country has almost doubled, and the percentage of African American attorneys and engineers has nearly tripled. *See* William J. Bowen &

Derek Bok, *The Shape of the River* 10 (1998) (citing U.S. Bureau of the Census statistics from 1960 and 1990). In 2000, all nine African American general counsels of Fortune 500 companies graduated from selective law schools. *See The Importance of Preserving a Core of African Americans at the Most Prestigious Law Schools*, 26 J. Blacks Higher Educ. 22, 23 (Winter 1999/2000).

From a purely economic perspective, at least one study has found a clear "wage premium" associated with attending a selective university. According to data collected by the Mellon Foundation, the average student who entered a "highly selective university" earned $22,000 more than the average student from a "moderately selective" college. *See* Alan B. Krueger, *Children Smart Enough to Get into Elite Schools May Not Need to Bother*, N.Y. Times, Apr. 27, 2000, at C2; *see also* Bowen & Bok, *supra*, at 123 (reporting that "black women from the [selective] schools earned 73% more ($27,000 more) than did all black women with BAs. The [selective school] earnings advantage was even greater for black men. . . ."). Accordingly, beneficiaries of affirmative action are far more likely to thrive financially than under-represented minorities on average.

In short, beneficiaries of affirmative action plans have gone on to live under social conditions that stand in stark contrast to those facing much of the country's minority population. Affirmative action contributes to closing the gap in social conditions between minorities and Caucasians. *See* Bowen & Bok, *supra*, at 10.

C. Closing the Gap in Social Conditions Is a Compelling State Interest

The Court has never developed a general definition of what constitutes a "compelling state interest." Nor has it considered whether redressing the social conditions facing many of the country's under-represented minorities can constitute a compelling state interest. Accordingly, this Court—unconstrained by precedent—is free to assess the compelling nature of this interest in light of the evidence of social disparities presented above.

A review of this data leaves no question about the severity of the socio-economic conditions facing many minorities today. Indeed, at least one Member of this Court has recognized the magnitude of the problem:

> Those effects [of past discrimination], reflective of a system of racial caste only recently ended, are evident in our workplaces, markets, and neighborhoods. Job applicants with identical resumes, qualifications, and interview styles still experience different receptions, depending on their race. White and African-American consumers still encounter different deals. People of color looking for housing still face discriminatory treatment by landlords, real estate agents, and mortgage lenders. . . Bias, both conscious and unconscious, reflecting traditional and unexamined habits of thought, keeps up barriers that must come down if equal opportunity and nondiscrimination are ever genuinely to become this country's law and practice.

Adarand, 515 U.S. at 273-74 (Ginsburg, J., dissenting).

At first blush, a "social conditions" justification for the University's admissions plans may appear at odds with the Court's previous decisions rejecting the notion that remedying general societal discrimination can constitute a compelling state interest. *See City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989); *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267 (1986). This is not the case. Unlike the remedial approach that the Court has taken in the past, applying social conditions as a compelling interest requires examination not of the causes of current social conditions, but simply of their existence today. Indeed, the causes of the gap in social conditions are irrelevant to a finding that the continued existence of the gap constitutes a compelling problem that our states must be permitted to address.

The depth and breadth of this problem leave no doubt that narrowing the gap in social conditions between under-represented minorities and Caucasians constitutes a compelling state interest. The state should be permitted to continue affirmative action plans—like those at the University of Michigan—that have made a substantial contribution to improving the social conditions of under-represented minorities.

III. THE LAW SCHOOL AND UNDERGRADUATE ADMISSIONS POLICIES ARE NARROWLY TAILORED TO ACHIEVE THE COMPELLING INTERESTS OF EITHER DIVERSITY OR EQUALIZATION OF SOCIAL CONDITIONS

In order to survive strict scrutiny, the University admissions policies must not only advance a compelling state interest (indeed, they advance at least two), but must also be "narrowly tailored" to achieve that compelling interest. *See Adarand*, 515 U.S. at 227. As set out below, both of the

University Policies satisfy the narrow tailoring requirements established both in, and after, *Bakke*.

A. Both the Law School and the Undergraduate Admissions Policies are Narrowly Tailored Under *Bakke*

In *Bakke*, the Court, while finding diversity to be a compelling state interest, ultimately struck down Davis' dual-track, "quota" system as not narrowly tailored to achieve that goal. *See Bakke*, 438 U.S. at 315-19. Both Justice Powell and Justice Brennan contrasted the Davis plan with the constitutional Harvard admissions plan, which considered race as a "plus" factor. *See id.* at 316-17 (Powell, J.), 326 n.1 (Brennan, J., concurring). Here, both of the lower courts properly extracted two fundamental principles from *Bakke*: (i) a two-track "quota" admissions system is not narrowly tailored, and thus is unconstitutional; and (ii) consideration of race as a "plus" factor does not violate the Equal Protection Clause. *See Grutter*, 288 F.3d at 745; *see also Gratz*, 122 F. Supp. 2d at 825-26. The University Policies fall squarely within the parameters identified in *Bakke*.

Neither of the University Policies considers minority applicants separately from Caucasian applicants or sets aside a predetermined number of spots for minorities in an incoming class. Instead, like the Harvard admissions program cited with approval in *Bakke*, both policies consider race as one of several "plus" factors. Under the Law School policy, race and ethnicity is one of several "soft" factors taken into account after an applicant's LSAT scores and grade point average are tallied. *See Grutter*, 288 F.3d at 746-47. While petitioners and several *amici* make much of the fact that the

Law School seeks to grant admission to a "critical mass" of under-represented minorities, such a goal is far from a strict quota. Rather, like the Harvard plan, the Law School's policy seeks to include in each class a flexible number of students of color sufficient to ensure that under-represented minorities do not feel isolated in the classroom. *See Grutter*, 288 F.3d at 747.

Similarly, the current undergraduate policy takes race into account by either giving an under-represented minority candidates twenty "points" out of a one hundred and fifty-point admissions scale, or "flagging" an application from a student from an under-represented minority group of color for further consideration despite lower grades and test scores. *See Gratz*, 122 F. Supp. 2d at 826-27. Again, there is no quota of minority students guaranteed admission to an entering class.

In short, *Bakke* expressly permitted universities to take race into account as a favorable factor, barring only strict quota systems that considered applicants of color separately. *See Bakke*, 438 U.S. at 312-15. By viewing race as one of several "plus" factors, the University Policies fall in line with *Bakke*'s commands.

B. The University Should Not Be Required to Consider Non-Viable Race-Neutral Alternatives in Order to Survive Strict Scrutiny

As the Sixth Circuit in *Grutter* recognized, since *Bakke*, this Court has suggested that another factor may be relevant to the narrow-tailoring analysis: an institution's consideration of race-neutral alternatives to an affirmative action plan.

See Grutter, 288 F.3d at 749 (citing *Croson*, 488 U.S. at 507).[4] The Court has never suggested, however, that consideration of *ineffective* race-neutral alternatives is required in order to satisfy the narrowly-tailored analysis. The brief submitted by the United States does precisely this. By arguing that the University of Michigan should have considered "top percentage" plans that guarantee admission to students who graduate in the top X percent of their high school class, the United States' brief ignores the serious limitations of such plans, including: (i) their failure to enroll under-represented minorities at selective state schools; (ii) the perverse incentives they create; and (iii) their inapplicability outside of the undergraduate context.

1. Top percentage plans have not increased the number of under-represented minority students in the most selective state schools

Following the abolition of affirmative action in the California and Florida state university systems, both states implemented top percentage plans. Under California's policy, students who complete certain course requirements and graduate in the top four percent of their high school class are guaranteed admission to one of eight California state schools, but not necessarily to a student's first choice school. *See* Catherine L. Horn & Stella M. Flores, *Recent Plans in College Admissions: A Comparative Analysis of Three States' Experiences* 19-20 (The Civil Rights Project at Harvard University 2003). Similarly, under Florida's "Talented 20" program, students who satisfy certain academic requirements

4. In *Grutter*, the Sixth Circuit determined that the Law School had considered and rejected several race-neutral alternatives. *See Grutter*, 288 F.3d at 750.

and graduate in the top twenty percent of their high school class automatically qualify for admission to the state school system, but, again, not to a student's top choice within that system. *See id.* at 21.

Statistics from California show a clear and disturbing admissions trend: since implementation of the plan in 1997, minority enrollment at California's state schools has increased overall, but minority enrollment at the most selective schools has sharply declined. For example, in 1997, before affirmative action was prohibited in California, 252 African American and 469 Chicano and Latino students enrolled at the University of California at Berkeley, one of the state's most selective schools. *See University of California Application, Admission and Enrollment of California Resident Freshmen for Fall 1995 through 2001, available at* http://www.ucop.edu/news/factsheets/flowfrc9501.pdf (last visited Feb. 13, 2003). In 2001, under the state's top percentage plan, those figures decreased to 137 African Americans and 379 Chicanos and Latinos—a drop of approximately 45% and 20%, respectively. *See id.* The same occurred at California's other most selective school, the University of California at Los Angeles, where the number of African American students dropped from 201 in 1997 to 137 in 2001. *See id.* Although the number of Chicano and Latino students rose slightly (from 565 in 1997 to 574 in 2001), the overall percentage of Chicano and Latino students actually decreased due to an increase in class size by approximately 400 students. *See id.* At the same time, the number of under-represented minority students at the much less selective University of California at Riverside nearly doubled between 1997 to 2001. *See id.*

It is too early to discern any clear enrollment trends under Florida's Talented 20 program, which went into effect in 2000. The plan has, however, drawn early criticism from both educational experts and university officials. A recent study conducted at Harvard University concluded that the Talented 20 program was "virtually irrelevant" to minority enrollment at Florida's state universities. *See* Gary Orfield, *Foreword* to Patricia Marin & Edgar K. Lee, *Appearance and Reality in the Sunshine State*: *The Talented 20 Program in Florida* v (The Civil Rights Project at Harvard University 2003). Moreover, experts and university officials have attributed any success in enrolling increased numbers of under-represented minority students at Florida State University (one of the two most selective schools in the Florida system) to the school's increased race-targeted recruitment and retention efforts, not the top percentage plan.[5] *See* Marin & Lee, *supra*, at 31-36; Horn & Flores, *supra*, at 56-58. Notably, this "success" has not carried over to the state's other most selective school, the University of Florida, where enrollment of both African American and Latino students declined between 2000 and 2001. *See* Horn & Flores at 50.

In short, top percentage plans like the ones in place in California and Florida have proven to be either irrelevant or harmful to the enrollment of under-represented minority students at selective state schools. Such plans are not viable, race-neutral alternatives to affirmative action plans.

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5. Although race cannot be considered in college and university admissions decisions, Florida's plan permits the use of race in awarding scholarships, outreach and recruiting efforts. *See* Marin & Lee, *supra*, at 9.

2. Top percentage plans depend upon—and create an incentive for students to stay in—segregated high schools

Proponents of top percentage plans also ignore the fact that they depend upon, and provide perverse incentives for students to stay in, segregated secondary schools. In practice, top percentage plans can only be truly effective in segregated school systems where, for example, the top ten percent of an inner-city school is likely to consist of primarily minority students. Thus, top percentage plans depend upon the existence of a *de facto* segregated secondary school system. *See* William G. Bowen & Neil R. Rudenstine, *Race Sensitive Admissions: Back to Basics*, The Chronicle Rev., Feb.7, 2003, B7, at B9.

Moreover, top percentage plans almost certainly provide a perverse incentive for a high-performing student of color to attend a segregated high school, where she is likely to be at the top of the class, rather than an integrated school, where she might fall into a lower percentile. Instead of promoting richly-diverse learning environments at all levels of education, top percentage plans depend upon and encourage segregation in high schools.

3. Top percentage plans do not work in the graduate or professional school context

Finally, top percentage plans are wholly unworkable at the graduate or professional school level. These schools—including law schools—receive applications from an enormous pool of national and international university graduates. They also have far smaller entering classes than undergraduate state schools. It is simply not feasible for these

schools to limit the universe of schools from which they will accept applications or admit a large enough entering class to accommodate the top percentages from all schools. *See id.*

CONCLUSION

The University Policies are narrowly tailored to achieve the dual compelling state interests of diversity and narrowing the existing gap in social conditions. For all of the reasons set forth herein, *amici curiae* urge this honorable Court to affirm the decisions of the courts below.

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